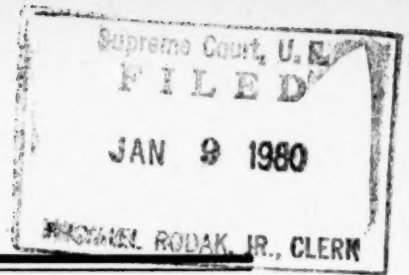


No. 79-747



In the Supreme Court of the United States

OCTOBER TERM, 1979

NAVAJO TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The opinion of the Court of Claims, dated June 13, 1979 (Pet. App. A), is reported at 601 F. 2d 536 (1979). The order of the Court of Claims on petitioner's motion for clarification dated September 28, 1979 (Pet. App. B), is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on June 13, 1979. On September 11, 1979, the Chief Justice granted an extension of time in which to file a petition for a writ of certiorari to and including November 10, 1979. The petition was filed on November 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether claims, presented by the Navajo Tribe under the Indian Claims Commission Act and voluntarily withdrawn from consideration after the applicable statute of limitations had run, could be reinstated approximately five years later.

STATUTE INVOLVED

The applicable statute of limitations, Section 12 of the Indian Claims Commission Act, 25 U.S.C. 70k, provides:

The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

Section 15 of the Indians Claims Commission Act, 25 U.S.C. 70n, governing the selection and compensation of Claims Act attorneys and the terms of their practice, is set out at Pet. 3.

STATEMENT

On July 11, 1950, the Navajo Tribe filed a petition before the Indian Claims Commission, assigned Docket No. 69, setting out eight separate claims (Pet. App. C). The first claim alleged a violation of the United States' obligation to protect the tribe's property rights pursuant to the Treaty of September 24, 1850. The second and third claims alleged fraud and duress, unconscionable consideration and unilateral mistake in the execution of the Treaty of August 12, 1868, or alternatively, that the treaty had been violated by the government's failure to

provide agricultural lands and by its infliction of damage to reservation lands. The fourth claim alleged a failure to provide educational and other services pursuant to the 1868 treaty. The fifth claim alleged that the United States exploited and allowed others to exploit the tribe's natural resources without adequate consideration, thereby violating its fiduciary duty under the 1868 treaty. The sixth claim alleged a violation of the 1868 treaty by failing to provide adequate construction of certain buildings and shops. The seventh claim was a general accounting claim. The eighth claim alleged a violation of a promise to return certain lands to the tribe in return for the Navajo's service in the Apache wars.

During August 1951, three new petitions were filed and assigned Docket Numbers 229, 299 and 353. The petition in Docket No. 229 alleged a taking based on facts originally set forth in Docket No. 69 (Pet. App. 3a). The petition in Docket No. 353 asserted a claim for mismanagement of the tribe's oil and gas resources, and the petition in Docket No. 299 alleged mismanagement of other resources (*ibid.*). No action was taken at that time with respect to Docket No. 69, even though many of the claims in it were duplicated by claims asserted in the three new petition (*ibid.*). Several years passed during which the parties focused on Docket No. 229 (Pet. 6). Then, on December 23, 1968, in response to a government request for greater specificity, the Commission ordered the tribe to file an amended petition in Docket No. 69 (Pet. App. 3a). On October 1, 1969, the Navajo filed a First Amended Petition (Pet. App. E) which in its entirety stated:

The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth, and eighth claims.

Nearly five years later, the tribe moved to amend further its petition in Docket No. 69. The government cross-motion for entry of final judgment dismissing claims 1 through 6 and 8. On January 23, 1975, the Commission denied the government's motion and granted petitioner's motion to amend the petition by "reformulating" the first six claims (Pet. App. F). The government's subsequent motion to certify that ruling to the Court of Claims was denied (Pet. App. 3a).

In 1976, the government filed a motion to dismiss or for a more definite statement as to reformulated claims 1 through 6 and 8 in the Second Amended Petition (*id.* at 4a). While that motion was pending, Docket No. 69 was transferred to the Court of Claims pursuant to Pub. L. No. 94-465, 90 Stat. 1990, which provided for the termination of the Indian Claims Commission (*ibid.*).

In 1978, a Court of Claims trial judge denied the government's motion to dismiss, holding (Pet. App. G) that claims 1-6 and 8 in the Second Amended Petition related back to the original petition.¹ Upon review of that ruling, the Court of Claims held on June 13, 1979 (Pet. App. A) that the First Amended Petition (filed in 1969) had effected a voluntary dismissal of claims 1 through 6 and 8. Therefore, the claims set out in the Second Amended Petition in 1975 were "presented" then for the first time, considerably after the applicable statute of limitations had run. Consequently, claims 1-6 and 8 of the Second Amended Petition were dismissed. Thereafter, the Navajo Tribe filed a motion for clarification, alleging that the dismissed claims might be asserted as part of the surviving claim 7 in Docket No. 69. On September 28, 1979, the Court of Claims rejected

¹The trial judge's opinion would have dismissed several of the claims on other grounds.

this contention, holding (Pet. App. B) that petitioner may pursue the dismissed claims "only if and to the extent they are also part of the claims asserted in the dockets other than docket No. 69." The petition for certiorari followed.

ARGUMENT

The decision of the Court of Claims is correct, depends largely on the particular facts of this case and lacks general importance. It is not in conflict with any decision of this Court or any appellate court and does not warrant further review.

1. Petitioner's principal contention (Pet. 10-15) is that the Court of Claims, in determining that there was a voluntary dismissal of petitioner's nonaccounting claims in Docket No. 69, misconstrued and failed to give effect to Section 6 of the Special Claims Contract between the tribe and its attorney. Section 6 of that contract (Pet. App. D) provides:

Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the Tribe and the Secretary.

Petitioner contends that since the record shows approval by neither the Tribe nor the Secretary, its attorney had no authority to withdraw the claims at issue.

The argument is misplaced. If petitioner's contention were correct, every step taken by petitioner's attorney that might affect some claim against the United States, even if made for strategic reasons, would require prior approval of the Secretary of the Interior. This would mean that the Secretary would be in a position to review strategic decisions made by legal opponents of the United States. The Court of Claims quite reasonably

construed Section 6 so as to avoid this rather curious result (Pet. App. 5a-6a):

We construe this provision as requiring tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, *i.e.*, the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, several of which probably were duplicative of those in other dockets, for what he perceived to be sound tactical or strategic reasons. That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract "to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract." Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action.

Presumably, Section 15 of the Indian Claims Commission Act authorized Indian tribes to select their own attorneys in part so that they might determine their own litigation strategy. It is not the responsibility of the Secretary of the Interior to determine what claims a tribe may present or decline to present. The Secretary's role is more limited: to assure that a tribe's attorney does not settle a claim to the disadvantage of the tribe in order to obtain a contingency fee. The Special Claims Contract was designed to guard against the latter eventuality.

2. Petitioner also argues (Pet. 12-14) that its attorney did not have express authority to withdraw claims 1-6 and 8, and that therefore his withdrawal of those claims was void. But an attorney is deemed to have implied

authority to manage his or her client's lawsuit, and the client accordingly is bound by the attorney's action. *Link v. Wabash R.R.*, 370 U.S. 626 (1962). "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent * * *." *Id.* at 634.²

3. Finally, petitioner argues (Pet. 15-19) that only the general allegations of damages were withdrawn, leaving the factual allegations untouched and the claims intact under the general prayer for relief. The Court of Claims correctly dealt with this contention (Pet. App. 4a-5a):

Although the 1969 amended petition "deleted" only the specific paragraphs which stated the claims in some detail, and not the general factual allegations preceding those paragraphs upon which the claims were based, *the deleted paragraphs were the actual statements of the claims* [emphasis added]. Indeed, the plaintiff recognized in its 1969 amendment that by deleting those paragraphs it was "*thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth, and eighth claims.*"

Petitioner's suggestion that the factual allegations and the general prayer for relief were intentionally left undisturbed so as to preserve the claims studiously

²Even if express tribal authority were required for the dismissal of claims 1-6 and 8, it is the tribe's burden to show that such authority was not granted (see *United States v. Beebe*, 180 U.S. 343, 352 (1901); *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F. 2d 136, 139 (10th Cir. 1966)), a burden not met here given the record's silence on this point.

ignores the plain language used by the tribe in its amended petition expressly "withdrawing" the claims "from consideration."³

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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³Of course, since Dockets 229, 299 and 353 were timely filed, petitioner remains free to litigate the extent to which the claims in those dockets overlap the claims in Docket No. 69.